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Subject: RS2477 and Disclaimers

As your Lands advisor:

**Neither the Secretary, Department of the Interior, or the Director, Bureau of Land Management, has sufficient authority under section 315 of the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1745) to issue a “Disclaimer of Interest” to acknowledge or validate rights that may have been acquired pursuant to Revised Statutes, section 2477 (RS 2477).**

See the attachment for complete advisory



Disclaim4.wpd

RS 2477 Highway Rights-of-Way  
FLPMA §315 Disclaimers

The Secretary of the Interior has announced an agreement with the Governor of Utah to review issues of RS 2477 rights of way within that State and the “acknowledgment” or “validation” of appropriate accepted grants of right of way through the issuance of recordable Disclaimers of Interest by the Bureau of Land Management. It is stressed that the review and disclaimer process will not be utilized for public lands in wilderness areas, National Parks, Refuges and the like (see attached press release).

**Neither the Secretary, Department of the Interior, or the Director, Bureau of Land Management, has sufficient authority under section 315 of the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1745) to issue a “Disclaimer of Interest” to acknowledge or validate rights that may have been acquired pursuant to Revised Statutes, section 2477 (RS 2477).**

RS 2477

(1) Enacted as section 8 of the Mining Law of 1866, re-enacted in 1783 as section 2477 of the Revised Statutes, and subsequently repealed in 1976, this law provided a Congressional grant of right of way for highway purposes over public land not reserved for public purposes. The 1976 repeal contained a savings clause (§701(a) of FLPMA) for any rights-of-way obtained prior to the repeal. (43 U.S.C. 932, repealed 1976)

Disclaimer of Interest

(2) Section 315 of FLPMA authorizes the Secretary to issue a document of disclaimer, in appropriate recordable format, where such will help to remove a cloud of title to a parcel(s) of land and where the Secretary determines that a record interest of the United States in such land has terminated by operation of law or is otherwise invalid.<sup>1</sup> (43 U.S.C. 1745(a))

Right of Way

(3) The term “right of way” is sometimes used to describe a right belonging to a party to pass over land of another. Bouche v. Wagner, 206 Or. 621, 293 P.2d 203, 209. As so used, it is only an easement: and grantee acquires only right to a reasonable and usual enjoyment thereof with owner of soil retaining rights and benefits of ownership consistent with the easement. Minneapolis Athletic Club v. Cohler, 287 Minn. 254, 177 N.W.2d 786,789. .

(4) An “easement” is an interest which one person has in the land of another. A primary characteristic of an easement is that its burden falls upon the possessor of the land from which it issued and that characteristic is expressed in the statement that the land constitutes a servient tenement and the easement a dominant tenement. Potter v. Northern Natural Gas Co., 201 Kan. 528, 441 P.2d 802, 805. An interest in land in and over which it is to be enjoyed, and is distinguishable from a “license” which merely confers personal privilege to do some act on the

land. Logan v. McGee, Miss, 320 So.2d 792, 793.

(5) Some Congressional grants of right of way have been determined to be grants of fee title subject to a reversion - a "limited" fee. See M-36964, 96 I.D. 439, January 5, 1989 for a fuller discussion relating to grants of railroad rights of way, limited fee, exclusive easements and rights of way. Such an opinion that grants of right of way pursuant to RS 2477 are in the nature of a limited fee has not yet been publically postulated and all reviewed court decisions have described the grant merely to be an easement or right of way.

#### Highway - Termini

(6) The route, no matter how rudimentary must, however, for RS 2477 purposes, have "definite termini." Dillingham, 705 P.2d at 414. Trails "running into wild, unenclosed and uncultivated country" do not meet the minimum standard of definiteness (they lack one terminus) nor do they suggest sufficient public use. Id. In rejecting claims arising from "desultory" use, the Alaska Supreme Court was influenced by the fact that those particular claimants "had no real interest in lands to which [their claimed RS 2477] gave access." Hamerly, 359 P.2d at 125.

Shultz v. Department of the Army, 10 F.3d 649, 9<sup>th</sup> Circuit 1993.

#### Record Interest of the United States

(7) To issue a Disclaimer it must be found that the interest(s) of the United States in the specified land has "terminated by operation of law or is otherwise invalid." 43 U.S.C. 1745(a) If the involved parcel of land (the servient tenement) is public land then it would be impossible to say that the interest(s) of the United States is invalid. Thus one must look at having the interest(s) "terminated by operation of law," terminated through "acceptance" of a RS 2477 grant of right of way.

(8) Removing areas such as National Parks, wilderness areas and the like from consideration creates problems in properly identifying highways with appropriate definite termini. For example, the Burr Trail in southern Utah, which both the Federal District and 10<sup>th</sup> Circuit Courts have found to be a RS 2477 right of way, has one of its termini within a National Park area. Under the Interior-Utah agreement, Burr Trail cannot be found to be a RS 2477 right of way as it does not have definite termini associated with the "reviewable" public land section of the route.

(9) Unless the grant of right of way is in the nature of a limited fee, it is not possible to adequately distinguish the "interests" of the dominant tenement (RS 2477 holder) and the servient tenement (the United States) in order to issue a Disclaimer of Interest. A grant under RS 2477 does not appear to meet the standards used by the Supreme Court in determining the trans-Pacific railroad rights of way to be in the nature of a limited fee (see Northern Pacific Railway v. Townsend, 190 U.S. 267 (1903)).

#### Separation of Interests

(10) Thus we are faced with whether one can precisely separate the “interest(s)” of the RS 2477 right of way holder and the United States.

(11) The character and extent of rights created by grant of easement is determined by construction of the language of the grant and by the extent of the use made of dominant tenement at time of grant. Natural Gas Pipeline Co. of America v. Cox, et. al., 490 F. Supp 452, 1980. A specification of width and location of surface right of way does not always determine the extent of the burden imposed on the servient land. Right of defendant to use the particular land in controversy is derived from the owner of the servient tenement, and whether it is a permissible use is to be determined by whether the owner of the servient tenement could have used the land in that manner. City of Pasadena v. Cal-Mich. Land & Water Co., 100 P.2d 883, 1941

(12) Once disclaimed, the United States may not utilize for similar or other purposes any of the interest(s) disclaimed.

(13) The United States may, if it desires, grant additional uses of the interest(s) involved in the RS 2477 right of way.

(14) The owner of servient estate may grant an easement to a third person similar to that held by another if it does not unreasonably interfere with the latter's operations and may use his property in any manner that is not inconsistent with the easement. Smith v. Rock Creek Water Corp., 208 P.2d 705, 93 CA.2d 49.

#### Reversion and Reversionary Interest

(15) Reversion is the residue of an estate left by operation of law in the grantor or his heirs. It is any future interest left in a transferor or his successor. Miller v. Dirken, 153 Pa.Super. 389, 33 A.2d 804,805. The term reversion has two meanings, first, as designating the estate left in the grantor during the continuance of a particular estate and also the residue left in grantor or his heirs after termination of particular estate. Davidson v. Davidson, 350 Mo. 639, 167 S.W.2d 641, 642; Miller v. C.I.R., C.C.A.6, 147 F.2d 189, 193.

(16) Reversionary interest is the interest which a person has in the reversion of lands or other property. A right to the future enjoyment of property, at present in the possession or occupation of another. The property that reverts to the grantor after the expiration of an intervening interest. A reversion of land is, as it were, the return of the land to the possession of the donor or his heirs after the termination of the estate granted.

From Black's Law Dictionary, 5<sup>th</sup> Edition

(17) Issuing a Disclaimer of Interest for a RS 2477 right of way would be transferring additional interest(s) of the United States not terminated through acceptance of the RS 2477 grant of right of way.

(18) The United States has a reversionary interest in the RS 2477 right of way and, therefore, an interest in the dominant tenement. If a Disclaimer of Interest is given for the RS 2477 right of

way, this interest of the United States is also given.

(19) There is no authority in law for the Secretary, Department of the Interior, or the Director, Bureau of Land Management, to grant any interests of the United States through a Disclaimer of Interest over those which may have "terminated" by operation of RS 2477.

(20) There is no authority in law for the transfer through a Disclaimer of Interest of the reversionary interest of the United States in the RS 2477 right of way.

(21) There is no authority in law for the transfer through a Disclaimer of Interest of the "shared rights" of the United States - the right of the United States to issue other rights of way, or, for that matter, other uses such as lease or permit, for the same, similar or other uses involving the interests in land that the holder of a RS 2477 right of way may also have.

Prepared April 17, 2003, by:  
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Attachment - News Release